

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative Penalty Order Issued to First Memorial Waterston Chapel; Cremation Society of Minnesota; Mark C. Waterston; and Kevin J. Waterston	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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This matter came on for hearing before Administrative Law Judge Linda F. Close on June 25, 2007, at the Office of Administrative Hearings, 100 Washington Ave. S., Minneapolis MN 55401-2138. The record closed on August 6, 2007 upon receipt of the Parties' final submissions.

Jocelyn F. Olson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota St., St. Paul, MN 55102-2130, appeared on behalf of the Department of Health (the Department).

Scott M. Lucas, Olson & Lucas, P.A., One Corporate Center I, 7401 Metro Blvd., Suite 575, Minneapolis MN 55439 appeared on behalf of First Memorial Waterston Chapel (First Memorial); Cremation Society of Minnesota (CSM); Mark C. Waterston; and Kevin J. Waterston (collectively Respondents).

STATEMENT OF THE ISSUES

1. Did Respondents violate Minn. Stat. § 149A.20, subd. 1 by allowing an unlicensed person to make funeral arrangements?
2. Did Respondents violate Minn. Stat. § 149A.71, subd. 2(f) by failing to have the licensed funeral director who arranged the funeral sign the itemized statement?
3. Was the Department justified in imposing a nonforgiveable administrative penalty?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondents Mark Waterston and Kevin Waterston own Respondents CSM and First Memorial. The Waterston family has been in the funeral business since 1955.¹ CSM and First Memorial are funeral establishments licensed by the Department.² The main office for CSM and First Memorial is in Minneapolis. First Memorial opened a branch office in Duluth in 2001.³ Initially, Joseph Green was the only licensed mortician at the Duluth location. However, since 2001, the Duluth location has had approximately nine other licensed morticians working there at various times.⁴ At the time of the hearing, the Duluth location had two licensed morticians, and a third employee who was about to become licensed.⁵

2. Joseph Green has operated the Duluth location since it opened.⁶ Beginning in the summer of 2002, Joseph Green's daughter Angela worked for First Memorial. The location was successful, and by 2004, Joseph Green needed help with funeral arrangements. However, it was difficult to find a mortician at that time, so Respondent Mark Waterston urged Joseph Green to use Angela to help with funeral arrangements.⁷

3. In 2004, Joseph Green trained Angela to interview families and record information for funeral arrangements. He did this by having Angela sit in on six or seven of his own interviews with families. After the initial training, Joseph observed two or three of Angela's interviews before allowing her to interview families on her own.⁸ Joseph received complements about Angela's work, and he never received a complaint from any family member. Angela continued working at the Duluth location until May 2006.⁹

4. In July 2006, the Department received a complaint that an unlicensed person was making funeral arrangements at Respondents' Duluth location. Marguerite Slonine, a Department investigator, was assigned to investigate the complaint.¹⁰

5. Slonine proceeded with the investigation by having a First Memorial employee pull files, at random, from the Duluth location's funeral arrangement files for the period January through February 2006. Upon review, Slonine believed that the files contained the writing of a female. She asked Doreen

¹ Testimony of Mark C. Waterston.

² Testimony of Marguerite Slonine.

³ Test. of M. Waterston.

⁴ Testimony of Joseph Green.

⁵ Test. of M. Waterston.

⁶ Test. of J. Green.

⁷ Test. of J. Green.

⁸ Test. of J. Green.

⁹ Test. of J. Green.

¹⁰ Test. of M. Slonine.

Green, the wife of Joseph Green, whose handwriting it was. Doreen identified the handwriting as that of Angela Green.¹¹

6. Slonine found Angela's handwriting in seven files. The handwriting was on forms the Respondents use to make funeral arrangements. Six of the forms included information on the deceased, the family of the deceased, the type and location of the funeral service, burial and cremation details, and an itemized statement of funeral costs.¹²

7. Slonine established that Angela is not a licensed mortician. Slonine also discovered that, when Angela Green wrote information on the forms, no licensed mortician was present with her.¹³

8. Joseph Green had signed and dated each of the forms completed by Angela, but he was not physically present with Angela when she filled out the forms.¹⁴ Joseph was not aware of any requirement that he be physically present when Angela met with families to make funeral arrangements.¹⁵

9. On January 16, 2007, the Department issued an Administrative Penalty Order assessing a nonforgiveable penalty of \$10,000.00 against the Respondents. The Department asserted as grounds the Respondents' use of an unlicensed person to make funeral arrangements, in violation of Minn. Stat. § 149A.20, subd. 1 and the Respondents' failure to have a licensed funeral director sign the itemized statement of costs in the presence of the family.¹⁶

10. The Department assessed a \$10,000.00 penalty because a Department investigator had discussed with Respondent Kevin Waterston, about a year earlier, a 2005 complaint about the Duluth location using an unlicensed person to make funeral arrangements. Kevin Waterston had told the investigator that the Duluth location was no longer allowing that. Based on that, the Department believed the 2006 violation was willful. In addition, the number and seriousness of the violations favored the imposition of a \$10,000.00 penalty. Finally, the Department concluded that Respondents had experienced an economic benefit from violating the law, which also justified the \$10,000.00 penalty. The Department forgives some part of penalties when the violation is

¹¹ Test. of M. Slonine.

¹² Test. of M. Slonine; see Ex. 4-9. Exhibit 10 is a form Angela partially filled out while helping the decedent's son locate a funeral establishment in Arizona, where the decedent's body was. Joseph Green did not sign Exhibit 10.

¹³ Test. of M. Slonine.

¹⁴ Test. of J. Green; see Ex. 4-9. Joseph Green did not sign Exhibit 10, which was a form partially filled out while helping the decedent's son locate a funeral establishment in Arizona, where the decedent's body was.

¹⁵ Test. of J. Green.

¹⁶ Ex. 2; Test. of M. Slonine.

not serious. It treated Respondents' violation as serious and therefore assessed a nonforgiveable penalty.¹⁷

11. Following receipt of the Administrative Penalty Order, on February 9, 2007, the Respondents requested the hearing which was held on June 25, 2007.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Health have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 149A.06.

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of statutes and rules have been fulfilled.

3. The burden of proof in this matter is on the Department to show by a preponderance of the evidence that a violation of a statute it is empowered to enforce has occurred.¹⁸

4. Minn. Stat. § 149A.20, subd. 1 requires that anyone who "arranges, directs, or supervises a funeral, memorial service, or graveside service" must hold a license to practice mortuary science.

5. The Department has shown, by a preponderance of the evidence, that Respondents violated Minn. Stat. § 149A.20, subd. 1.

6. Minn. Stat. § 149A.71, subd. 2(f) requires the licensed funeral director who made the funeral arrangements to sign the itemized statement.

7. The Department has shown, by a preponderance of the evidence, that Respondents violated Minn. Stat. § 149A.71, subd. 2(f).

8. Minn. Stat. § 149A.06, subd. 1 permits the Department to impose penalties for violations of chapter 149A.

9. The Department has shown, by a preponderance of the evidence, that the penalty is justified.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

¹⁷ Testimony of David Benke.

¹⁸ Minn. R. 1400.7300, subp. 5.

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: the Commissioner AFFIRM the administrative penalty of \$10,000.00.

Dated: August 24, 2007

s/Linda F. Close

LINDA F. CLOSE

Administrative Law Judge

Reported: Digitally recorded
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Health (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Dianne Mandernach, Commissioner, Department of Health, 625 N. Robert Street, P.O. Box 64975, St. Paul, MN 55164-0975, (651) 201-5810, to learn the procedure for filing exceptions or presenting argument.

Pursuant to Minn. Stat. § 149A.06, subd. 6, the Commissioner is required to make a decision within 30 days. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The basic facts of this case are undisputed. Respondents permitted an unlicensed person, Angela Green, to meet with families to make funeral arrangements. From all the evidence, it appears that Ms. Green capably handled this responsibility. However, the statute requires that anyone who makes funeral arrangements be licensed by the Department to practice mortuary science.¹⁹ Because of this requirement, the Department found a violation of the statute and imposed the penalty at issue.

In their defense, Respondents argue the application of an exception that permits unlicensed persons to assist a licensee in certain activities. Minn. Stat. § 149A.70, subd. 6 provides that “a licensed funeral establishment may employ unlicensed personnel to perform the duties of a funeral director or mortician so long as the unlicensed personnel act **under the direct supervision** of an individual holding a current license to practice mortuary science....” Respondents argue that Ms. Green was acting under the direct supervision of her licensed father, and her activities therefore did not violate chapter 149A.

Chapter 149A does not define “direct supervision,” and there is no case law guidance on its meaning in the context of morticians. The Department argues powerfully for a common sense interpretation of the phrase, and the ALJ is persuaded by its arguments. By qualifying “supervision” with the word “direct” the Legislature clearly had more than general oversight in mind. While Joseph Green trained his daughter and signed off on her work, there is no doubt that he did not provide the close supervision that the phrase “direct supervision” implies.

The phrase “direct supervision” is defined in other licensing statutes, and these give some guidance to what that phrase means. In these contexts, direct supervision requires physical presence or something very close to that.²⁰ Joseph Green was not present when his daughter met with families. He did not recall anything about the six families whom his daughter had made arrangements for.²¹ Indeed, Ms. Green had made two of the six arrangements by telephone.²²

The Parties have argued at length about whether the ALJ should defer to the Department’s long-standing interpretation of the statute to mean physical presence of a licensee when funeral arrangements are being made by an assistant. In this case, no deference is given because the statute is plain enough

¹⁹ Minn. Stat. § 149A.20, subd. 1.

²⁰ A licensed physical therapist, for example, must be physically present to provide “direct supervision” to a physical therapy assistant. Minn. Stat. § 148.65, subd. 6. A speech language pathologist may delegate duties to an assistant, but must provide “on-site, in-view observation” of the assistant. Minn. Stat. § 148.5192, subd. 3(d). Similar requirements exist for occupational therapy assistants and hearing dispenser trainees. See Minn. Stat. §§ 148.6402, subd. 10; 153A.13, subd. 10.

²¹ Test. of J. Green.

²² See Ex. 4, 9.

on its face and its application to this matter is clear.²³ Common understanding dictates that “direct supervision” means close contact between the licensee and the assistant. Evidence of that is entirely absent as to the six families that Ms. Green made arrangements for.

Respondents also argue that the Department, by denying Ms. Green’s activities the protection of the statutory exception, is imposing new statutory language on actions that occurred prior to the enactment of the new language. Effective August 1, 2007, chapter 149A is amended to prohibit funeral establishments from using unlicensed personnel except for assisting in moving a dead body. On those occasions, the assistant must be in the “immediate physical presence of the licensee.”²⁴

The Department regards the 2007 amendments as “housekeeping” measures that reflect the Department’s long-standing interpretations.²⁵ The ALJ rejects Respondents’ view that the Department is applying a new policy to Respondents. The new statute appears somewhat more restrictive than the law in effect in 2006 when Ms. Green was arranging funerals. But it is more restrictive in the scope of permitted activity, not in the degree of supervision required. Direct supervision has always been required and continues to be in the new law.

Respondents challenge the imposition of a \$10,000.00 penalty. Minn. Stat. § 149A.06, subd. 1 authorizes the Department to assess monetary penalties for violations of chapter 149A. Subdivision five limits the penalty amount to \$10,000.00 per violation. It also enumerates six factors for the Department to consider in assessing the penalty amount, as follows:

- (1) the willfulness of the violation;
- (2) the gravity of the violation;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person allowing or committing the violation; and
- (6) other factors as justice may require, if the regulatory agency specifically identifies the additional factors in the regulatory agency's order.

David Benke, the manager of the mortuary science division of the Department, testified to the reasons for assessing a \$10,000.00 penalty and discussed the above factors as they applied to the Respondents. Benke noted that Respondents’ conduct gave rise to several violations, in that there were

²³ See *In re the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 516 (Minn. 2007) (when words of a law are clear and unambiguous, the court will not defer to the agency’s interpretation).

²⁴ See Act of May 23, 2007, ch. 114, 2007 Minn. Sess. Law Serv. 563-82.

²⁵ Test. of D. Benke.

multiple times when Ms. Green arranged funerals. In addition, in each case, the itemized statement was signed by Mr. Green, who was not the person making the arrangements. Ms. Green's arranging and Mr. Green's signing constituted separate violations in each of the six cases.²⁶ Notwithstanding numerous violations, the Department assessed only one penalty in the interests of resolving the matter.²⁷

Benke discussed Kevin Waterston's conversation with a Department investigator, a year before the investigation that gave rise to the penalty, in which Waterston assured the investigator that no unlicensed activity was occurring at the Duluth location. Benke saw the subsequent violations as evidence of the Respondents' willfulness in violating the law.²⁸ Benke also testified that the Department regards the violations as serious, because chapter 149A has consumer protection as its primary objective. The number of violations also played into the Department's determination to assess the maximum penalty. The investigator found violations in six files in just a two-month period. Finally, the Department considered that Respondents had experienced an economic benefit, in that Ms. Green's compensation was less than that of a mortician.²⁹

The ALJ is persuaded that the Department appropriately applied the statutory factors when it assessed a \$10,000.00 penalty. Moreover, given the seriousness of violating the Department's consumer-protection laws on multiple occasions, the Department was justified in making the penalty nonforgiveable.

L. F. C.

²⁶ Respondents argue that the Administrative Penalty Order (Ex. 2) illegally assessed the penalty based on the Department's imposition of a requirement that the licensee sign the itemized statement in the presence of the family. While the Order incorrectly paraphrases the statute by referencing an in-presence requirement, the Order correctly states the statutory requirement that the person who signs the statement must be licensed and must be the person who actually made the arrangements. Joseph Green signed, but he was not the person who made the arrangements. It is this conduct that violates the statute.

²⁷ Test. of D. Benke.

²⁸ Respondents argue that Benke used the prior incident and conversation as evidence of a history of violations. That is not what Benke testified: he stated that the prior conversation evidenced willfulness. Test. of D. Benke.

²⁹ Test. of D. Benke.